American Bar Association
www.supremecourtpreview.org

No. 07-1356

In The Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ Of Certiorari To The Kansas Supreme Court

BRIEF OF AMICI CURIAE STATES OF NEW MEXICO, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KENTUCKY, MARYLAND, MICHIGAN, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA ON BEHALF OF PETITIONER

GARY K. KING
Attorney General of New Mexico

JOEL JACOBSEN
Counsel of Record
Assistant Attorney General

111 Lomas Blvd., NW, Suite 300
Albuquerque, NM 87102
(505) 222-9061

Counsel for Amici Curiae

[Additional Counsel On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General
State of Alabama

TERRY GODDARD
Attorney General
State of Arizona

JOHN W. SUTHERS
Attorney General
State of Colorado

RICHARD S. GEBELEIN
Chief Deputy Attorney General
State of Delaware

BILL MCCOLLUM
Attorney General
State of Florida

MARK J. BENNETT
Attorney General
State of Hawaii

LAWRENCE G. WASDEN
Attorney General
State of Idaho

LISA MADIGAN
Attorney General
State of Illinois

STEVE CARTER
Attorney General
State of Indiana

JACK CONWAY
Attorney General
Commonwealth of Kentucky

DOUGLAS F. GANSLER
Attorney General
State of Maryland

MICHAEL A. COX
Attorney General
State of Michigan

MIKE MCGRATH
Attorney General
State of Montana

KELLY A. AYOTTE
Attorney General
State of New Hampshire

ANNE MILGRAM
Attorney General
State of New Jersey

WAYNE STENEHJEM
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth of Pennsylvania

HENRY D. MCMASTER
Attorney General
State of South Carolina

LAWRENCE E. LONG
Attorney General
State of South Dakota

ROBERT E. COOPER, JR.
Attorney General and Reporter
State of Tennessee

GREG ABBOTT
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

ROBERT F. MCDONNELL
Attorney General
Commonwealth of Virginia

QUESTION PRESENTED

Whether a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes – a question the Court expressly left open in *Harvey*, and which has resulted in a deep and enduring split of authority in the Circuits and state courts of last resort?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Interest of the Amici Curiae..... 1

Summary of the Argument..... 1

Argument 4

I. The Trial Court Properly Allowed Voluntary Statements to Be Used for Impeachment Purposes 4

II. Prohibiting the Use of Voluntary Statements for Impeachment Purposes Undervalues the "Truth-Seeking" Function of Trials 9

A. This Kansas Supreme Court's Opinion Failed to Abide by This Court's Precedent Requiring a Court to Balance the Twin Goals of Substantive Justice and Procedural Fairness 9

B. If a Proper Balancing of Interests Were Performed, It Would Reveal Marginal Benefits but Massive Losses 12

III. The Kansas Supreme Court's Majority Opinion Improperly Ignored this Court's Recent Sixth Amendment Jurisprudence ... 16

Conclusion..... 18

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....3, 16

Banks v. Dretke, 540 U.S. 668 (2004).....10

Blackburn v. Alabama, 361 U.S. 199 (1960) 7

Blakely v. Washington, 542 U.S. 296 (2004).....3, 17

Cheney v. United States District Court, 542 U.S. 367 (2004).....9

Crawford v. Washington, 541 U.S. 36 (2004).....3, 6, 16, 17

Davis v. Washington, 547 U.S. 813 (2006).....6

District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).....6

Harris v. New York, 401 U.S. 222 (1971) 1, 5, 12

Hudson v. Michigan, 547 U.S. 586 (2006) 2, 11, 12

Jackson v. Denno, 378 U.S. 368 (1964).....6, 7

Kuhlmann v. Wilson, 477 U.S. 436 (1986).....4, 8, 14

LaChance v. Erickson, 522 U.S. 262 (1998).....15

Massiah v. United States, 377 U.S. 201 (1964) ...3, 4, 14

Mathews v. United States, 485 U.S. 58 (1988).....15

Michigan v. Harvey, 494 U.S. 344 (1990) 1, 17

Miller-El v. Dretke, 545 U.S. 231 (2005).....17

Mincey v. Arizona, 437 U.S. 385 (1978).....5, 6, 8

Miranda v. Arizona, 384 U.S. 436 (1966) 5

New Jersey v. Portash, 440 U.S. 450 (1979) 5, 6, 8

TABLE OF AUTHORITIES – Continued

Page

Nix v. Whiteside, 475 U.S. 157 (1986).....1, 15

Nix v. Williams, 467 U.S. 431 (1984) 11, 13

Oregon v. Hass, 420 U.S. 714 (1975).....5, 12, 13

Portuondo v. Agard, 529 U.S. 61 (2000) 9

Powers v. Ohio, 499 U.S. 400 (1991) 17, 18

Sparf v. United States, 156 U.S. 51 (1895) 17

State v. Swinton, 847 A.2d 921 (Conn. 2004) 8

Terry v. Ohio, 392 U.S. 1 (1968) 14

Texas v. Cobb, 532 U.S. 162 (2001) 3, 14

United States v. Goodlow, 597 F.2d 159 (9th Cir. 1979) 15

United States v. Henry, 447 U.S. 264 (1980) 4

United States v. Mandujano, 425 U.S. 564 (1976).....15

United States v. Polizzi, 549 F.Supp.2d 308 (E.D. N.Y. 2008).....17

Walder v. United States, 347 U.S. 62 (1954)....1, 4, 5, 12

Watts v. Indiana, 338 U.S. 49 (1949) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.....4, 12

U.S. Const. amend. V 6

U.S. Const. amend. VI.....*passim*

U.S. Const. amend VIII.....7

TABLE OF AUTHORITIES – Continued

Page

RULES OF COURT

Supr. Ct. Rule 37 1

OTHER AUTHORITIES

John Paul Stevens, "Foreword, Symposium: The Jury at a Crossroad: The American Experience," 78 CHI.-KENT L. REV. 907 (2003).....17

Roscoe Pound, "The Causes of Public Dissatisfaction with the Administration of Justice," 40 AM. L. REV. 729 (1906) 10

INTEREST OF THE AMICI CURIAE

The Amici Curiae States appear in support of Petitioner, the State of Kansas. Supr. Ct. Rule 37.1. The Amici have a significant interest in the question presented by Petitioner's brief on the merits, the answer to which has the potential to affect dramatically the conduct of criminal trials across the Nation. As demonstrated by the Petition for Writ of Certiorari, courts around the country have become hopelessly split on the question presented since this Court specifically reserved ruling on it in *Michigan v. Harvey*, 494 U.S. 344, 354 (1990).

SUMMARY OF THE ARGUMENT

When a criminal defendant takes the stand in his or her own defense, determining his or her credibility is usually the jury's single most important factfinding function. The Kansas Supreme Court majority's opinion severely handicaps the jury's ability to perform that function effectively. In holding that Respondent was wrongfully impeached by volunteered words from his own mouth, the majority effectively recognized a constitutional right to commit perjury in these circumstances. That result contravenes principles affirmed in *Nix v. Whiteside*, 475 U.S. 157, 173 (1986); *Harris v. New York*, 401 U.S. 222, 225 (1971); and *Walder v. United States*, 347 U.S. 62, 65 (1954), among other cases.

This Court has previously excluded a criminal defendant's statements for all purposes only when the statements at issue were compelled. In other situations, a witness's statements, however obtained, may be used for impeachment purposes. The different treatment of involuntary and voluntary statements is based on fundamental constitutional principles whose surpassing importance was not recognized in the majority's opinion. Those animating principles include the importance of the constitutional text, which specifically excludes compelled self-incrimination; obvious concerns about the quality of evidence obtained by compulsion; and the human and political rights transgressed when government officials compel a suspect to incriminate him- or herself. None of those principles is served by the *per se* rule adopted by the Kansas majority.

This Court's Sixth Amendment precedent requires a court to balance the twin goals of substantive justice and procedural fairness to determine what course of action promises the greatest benefit at the least cost. *Hudson v. Michigan,* 547 U.S. 586, 591 (2006). The Kansas Supreme Court failed to perform the required balancing. Had it done so, it would have recognized its *per se* rule of inadmissibility did little to promote procedural fairness, because the incentive for police officers or prison officials knowingly to violate the Sixth Amendment in hopes that the accused will take the stand and commit perjury on the precise subject of investigation is so small. In addition, there are legitimate and constitutional reasons

for officials to investigate a person facing pending charges. *Texas v. Cobb*, 532 U.S. 162, 171-72 (2001); *Massiah v. United States*, 377 U.S. 201, 207 (1964). Under the Kansas Supreme Court's *per se* rule, evidence gathered by such permissible means is not admissible even if it is unexpectedly made relevant by the defendant's perjurious testimony. But because the collection of such evidence is not wrongful, it is not in need of deterrence. The majority's blanket rule thus excludes properly-gathered evidence, which serves no constitutional or social purpose at all.

In addition, the Sixth Amendment has in recent years been a focus of this Court's sustained attention in several groundbreaking opinions, such as *Crawford v. Washington*, 541 U.S. 36 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Those and many other cases have suggested new analytic approaches to the interpretation of the various clauses of the Sixth Amendment, including a renewed emphasis on the constitutional autonomy of the jury as a factfinding body. *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). The Kansas Supreme Court's majority opinion did not consider any developments in Sixth Amendment jurisprudence since 1990. Had it done so, it would have recognized that its approach, which reduces the jury's authority by severely limiting its ability to make the most important of all credibility determinations, is inconsistent with *Blakely* and related cases.

ARGUMENT

This case involves a private conversation between the Respondent and his cellmate. Because charges were pending against Respondent and the cellmate was cooperating with authorities, the prosecution conceded that Respondent's voluntary statements were inadmissible in its case in chief pursuant to the rule established by *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980). *See also Kuhlmann v. Wilson,* 477 U.S. 436, 459-60 (1986). The Kansas Supreme Court held, as a matter of federal constitutional law, that the statements also could not be used to impeach Respondent after he took the stand in his own defense and testified to a version of events dramatically different than that he had recounted to his cellmate. This Court should reverse the Kansas Supreme Court.

I. The Trial Court Properly Allowed Voluntary Statements to Be Used for Impeachment Purposes.

For at least half a century, this Court's jurisprudence has recognized a constitutionally-significant distinction between evidence admitted during the prosecution's case in chief and evidence admitted to rebut a defendant's testimony. In *Walder v. United States*, 347 U.S. 62 (1954), involving physical evidence seized in violation of the Fourth Amendment, Justice Frankfurter's opinion for the Court observed:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.

Id. at 65.

In *Harris v. New York*, 401 U.S. 222 (1971), this Court similarly held that a statement taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), was properly used to impeach a testifying defendant. 401 U.S. at 225-26. That ruling was reaffirmed in *Oregon v. Hass*, 420 U.S. 714, 722-23 (1975).

Only in one specific situation has this Court held that an illegally-obtained statement cannot be introduced against a criminal defendant even for purposes of impeachment: when the statement in question is the defendant's compelled self-incrimination. *Mincey v. Arizona*, 437 U.S. 385, 398, 401 (1978); *New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979). The former case involved the hours-long interrogation of a hospitalized gunshot victim as he passed in and out of consciousness. 437 U.S. at 399-400. In the latter case, this Court declared it "crucial" and "central" to its decision that the defendant's statement had been compelled by a grant of immunity. 440 U.S. at 458-59.

The Kansas Supreme Court majority treated the Respondent's private conversation with his cellmate

as if it were a compelled statement. But *Mincey* and *Portash* are based on three important constitutional principles, none of which was considered in the majority opinion. First and most significantly, the total exclusion of compelled self-incrimination is required by the text of the Fifth Amendment. The same is not true of voluntary statements obtained in violation of *Miranda* or *Massiah*. This Court's recent Sixth Amendment jurisprudence has emphasized the importance of the ratified text. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 51 (2004); *Davis v. Washington*, 547 U.S. 813, 824 (2006). Rights explicitly guaranteed in the text of the Constitution and thus knowingly ratified by the people stand on a different footing from rights established by judicial exegesis after the passage of centuries. *See District of Columbia v. Heller,* 554 U.S. ___, 128 S.Ct. 2783, 2788-2812, 2821, 171 L.Ed.2d 637 (2008), and *id*. at 2822-23, 2846-47 (Stevens, J., dissenting).

Second, disparate treatment is justified by obvious concerns about the quality of evidence obtained by compulsion. *See, e.g., Jackson v. Denno*, 378 U.S. 368, 386 (1964) (referring to "the probable unreliability of confessions that are obtained in a manner deemed coercive"); *Watts v. Indiana,* 338 U.S. 49, 59-60 (1949) (Jackson, J., concurring in part and dissenting in part) ("Of course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may

even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body."). For that reason, the exclusion of statements obtained by compulsion will often – perhaps usually – *further* truth-seeking by eliminating distracting falsehood. The same generalization cannot be made with regard to the exclusion of statements volunteered during a private conversation.

Third, the distinction is based on deep-seated convictions regarding the relationship of the state to the individual. *Jackson*, 378 U.S. at 386. Freedom from official maltreatment is the only right guaranteed twice in the Bill of Rights, in both the Fifth and Eighth Amendments. The exclusion of compelled statements is an expression of "important human values" whose significance is at least as great outside the courtroom as within it. *Blackburn v. Alabama,* 361 U.S. 199, 206 (1960). The same cannot be said of the right at issue in this case. Indeed, the Kansas majority would have reached the opposite result if the cellmate had switched allegiance after rather than before the fateful conversation. Pet. App. 22a. In other words, nothing directly experienced by Respondent himself violated his Sixth Amendment right to counsel, but only a sequence of events that occurred out of his presence and without his knowledge. Indeed, the majority's summary of facts, Pet. App. 8a (informant was instructed to "'keep [his] ear open and listen' for incriminating statements"), show the

informant's instructions complied with the rule laid down in *Kuhlmann,* 477 U.S. at 459-60 ("the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks"). Apparently the informant crossed the line between merely listening and actively eliciting statements, prompting the prosecution's trial-court concession. Pet. App. 57a; Joint Appendix at 154. But the line between proper and improper use of informants in the prison setting is a thin one. *State v. Swinton*, 847 A.2d 921, 966 (Conn. 2004) ("there is no bright line test by which this determination is made"). A right so transitory and conditional is not a basic political or human right on the same level as the right to be free of official maltreatment.

None of these important reasons for treating voluntary and involuntary statements differently was considered by the Kansas Supreme Court majority. Far from considering the triad of important considerations undergirding the distinction drawn in *Mincey* and *Portash*, the majority did not even cite those cases. Only the dissent did so. Pet. App. 42a. Rather, the majority saw its task as choosing between "two analytical approaches", Pet. App. 19a, and concluded that one approach would discourage behavior of which it disapproved. Pet. App. 21a. That too-narrow focus was constitutional error.

II. Prohibiting the Use of Voluntary Statements for Impeachment Purposes Undervalues the "Truth-Seeking" Function of Trials.

Accurate credibility determination by the jury is not an evil in need of judicial remedy. Perjury, on the other hand, is. The Kansas Supreme Court's majority opinion failed to recognize the full implications of its categorical elevation of the goal of procedural fairness over the equally-important goal of substantive justice. A proper weighing would have revealed minimal if not wholly illusory benefits achieved at unjustifiably great cost.

A. This Kansas Supreme Court's Opinion Failed to Abide by This Court's Precedent Requiring a Court to Balance the Twin Goals of Substantive Justice and Procedural Fairness.

"A trial ideally is a search for the truth." *Portuondo v. Agard,* 529 U.S. 61, 77 (2000) (Ginsburg, J., dissenting). Self-evidently, the truth cannot be arrived at by concealing important pertinent information from the jury. On the contrary, this Court has recognized that "the need for information in the criminal context" is especially weighty. *Cheney v. United States District Court,* 542 U.S. 367, 384 (2004). The criminal justice system has a "'fundamental' and 'comprehensive' need for 'every man's evidence.'" *Id.* (quoting *United States v. Nixon,* 418 U.S. 683, 709-10 (1974)). The majority of the Kansas

Supreme Court failed to recognize the importance of the system's needs.

In *Banks v. Dretke,* 540 U.S. 668 (2004), this Court emphasized "the 'special role played by the American prosecutor in the search for truth in criminal trials.'" *Id.* at 696 (quoting *Stickler v. Greene,* 527 U.S. 263, 281 (1999)). That is a role embraced by most prosecutors as a matter of professional pride. But in the following passage the Kansas Supreme Court's majority denied that judges have a comparable duty to the truth:

> Although trial judges are called upon to determine the admissibility of evidence to effectuate the courts' truth-seeking function, there is nothing in our federal or state constitutions that requires us to make truth-seeking the overriding principle that trumps our constitutionally protected rights.

Pet. App. 20a.

That passage encapsulates the sporting theory of courtroom procedure, by which the judge's sole duty is to enforce the rules of the game without regard to truth and justice. Roscoe Pound, "The Causes of Public Dissatisfaction with the Administration of Justice," 40 AM. L. REV. 729, 738-39 (1906). But while procedural fairness is indeed an important goal of the American criminal justice system, it is not the sole goal. Substantive justice is also important. True justice cannot reliably be premised on anything but the jury's appreciation of the significant knowable

facts. Because substantive justice and procedural fairness are both goals of the justice system, this Court has repeatedly held that evidence should be suppressed only "'where its deterrence benefits outweigh its "substantial social costs."'" *Hudson v. Michigan,* 547 U.S. 586, 591 (2006) (quoting *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357, 364-65 (1998), which in turn quoted *United States v. Leon,* 468 U.S. 897, 907 (1984)).

The scale metaphor conveys that procedural fairness and substantive justice are both worthy goals. One is not categorically more important than the other. When they conflict, a comparison must be made of costs and benefits. The correct option is that which promises the greatest benefit at the least cost. *Id.*

Far from comparing potential benefits against certain costs, however, the Kansas Supreme Court's majority adopted an absolute ranking of priorities, holding that a non-textual constitutional prohibition on certain forms of factual investigation is always a higher priority than "truth-seeking" – the pursuit of substantive justice. Pet. App. 20a. That absolute ranking of priorities was contrary to the interpretation of the assistance of counsel clause adopted by this Court in *Nix v. Williams,* 467 U.S. 431, 446 (1984) ("Williams contends that because he did not waive his right to the assistance of counsel, the Court may not balance competing values in deciding whether the challenged evidence was properly admitted. . . . We disagree.").

In creating an absolute ranking of priorities, the majority informed the Respondent that he could provide a version of events under oath at retrial without risk that his jury would hear the much different version he told in private when his guard was down. That ruling effectively recognized a constitutional right to commit perjury in this uncommon but far from unique situation. In the past, this Court has not hesitated to use strong words to describe similar results. *Hass,* 420 U.S. at 723 ("inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth"); *Harris,* 401 U.S. at 225-26 ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."); *Walder,* 347 U.S. at 65 ("Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment."). The word used by this Court in the cited cases is equally applicable to the Kansas Supreme Court's majority opinion.

B. If a Proper Balancing of Interests Were Performed, It Would Reveal Marginal Benefits but Massive Losses.

"[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 547 U.S. at 596. The majority's opinion identifies the targeted incentive: "Allowing the admission of this testimony as rebuttal evidence would

invite the State to engage in clandestine behavior in gathering evidence in violation of our constitutional rights." Pet. App. 21a. The concern, then, is that the State will engage in clandestine evidence-gathering despite certain knowledge that evidence so gathered cannot be used in its case in chief, based on the hope that the defendant will choose to take the witness stand and commit perjury regarding the precise subject of the illegally-gathered evidence, making it usable on rebuttal.

That situation obviously does not arise frequently in Kansas – otherwise this case would not have raised an issue of first impression. *See* Pet. App. 57a-59a. Thus the court was concerned about the incentive officials have to clandestinely gather evidence in hopes that events beyond their control will follow one relatively uncommon course rather than any number of other, far more likely courses. But when there is "little to gain from taking any dubious 'shortcuts' to obtain the evidence", the exclusionary rule can have little deterrent effect. *Williams,* 467 U.S. at 446. *See also Hass*, 420 U.S. at 723 (genuinely abusive official misconduct can be recognized and dealt with on a case-by-case basis).

The Kansas Supreme Court's rule will achieve little real deterrent effect for another reason, too: the exclusionary rule cannot deter conduct that is not thwarted by its application. A rational prison official might have an incentive to obtain information from a represented prisoner for purposes wholly unrelated to the charges pending against him, such as the

investigation of prisoner misconduct. Although evidence gathered for such an unrelated purpose might occasionally become relevant to a defendant's credibility in a pending case, eliminating its incidental use as impeachment will obviously have no tendency to deter its collection for the other purpose, even if such deterrence were socially desirable. *Terry v. Ohio*, 392 U.S. 1, 14 (1968) (the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal").

Similarly, a rational police officer or prison official has a realistic incentive to gather evidence from a represented person awaiting trial when investigating a different crime. But, self-evidently, suppressing impeachment evidence in one prosecution will not deter investigations into other crimes, even if such deterrence were socially desirable. *See Massiah,* 377 U.S. at 207 (being accused of one crime provides no immunity from investigation for other crimes). *Accord Texas v. Cobb*, 532 U.S. 162, 171-72 (2001) ("the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses").

Finally, a rational police officer or prison official has an incentive to engage in the passive evidence-gathering permitted by *Kuhlmann.* 477 U.S. at 459-60. The majority's blanket rule thus excludes some

properly-gathered evidence, which serves no constitutional or social purpose at all.

In short, the benefits of the majority's *per se* rule are small and perhaps entirely illusory. Balanced against them are costs both mundane and grand. At the mundane level, the Kansas majority's *per se* rule would inevitably produce disputes about the "real" purpose of any collateral police investigation or prison intelligence-gathering, imposing administrative costs on the courts to decipher the "real" motive and increasing the likelihood of inconsistent and hence unpredictable results. Such unpredictability could only vitiate any hypothetical deterrent effect.

Moreover, taking "a grander view of our process," *United States v. Goodlow,* 597 F.2d 159, 163 (9th Cir. 1979) (Kennedy, J., for the court), nothing less than justice itself is imperiled by the judicial countenancing of perjury. *Nix v. Whiteside,* 475 U.S. 157, 174 (1986) ("No system of justice worthy of the name can tolerate" a lawyer's passive acceptance of a client's perjury); *United States v. Mandujano,* 425 U.S. 564, 576 (1976) (plurality) ("Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings."). *See also Mathews v. United States,* 485 U.S. 58, 71 (1988) (White, J., dissenting) (describing "the scourge of an effective criminal justice system: perjury"). That is why "[i]t is well established that a criminal defendant's right to testify does not include the right to commit perjury." *LaChance v. Erickson,* 522 U.S. 262, 265 (1998). The

majority opinion of the Kansas Supreme Court adds an asterisk to that categorical statement.

In short, while the majority's opinion makes procedural fairness a higher priority than substantive justice, its opinion does little to ensure fairness, at least as anyone outside the criminal justice system would define that term. But it does much to prevent justice, and much to erode the confidence of ordinary citizens in their judicial system.

III. The Kansas Supreme Court's Majority Opinion Improperly Ignored this Court's Recent Sixth Amendment Jurisprudence.

In the 18½ years since the Court expressly left open the issue presented by this case, *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), this Court has cited the Sixth Amendment in no fewer than 174 decisions, according to a Westlaw search. Some of those decisions have revolutionized our understanding of the Sixth Amendment, as for example *Crawford v. Washington*, 541 U.S. 36 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). While those particular decisions and many of the others examined parts of the Sixth Amendment other than the assistance of counsel clause, it is not self-evident why different analytic approaches would be appropriately applied to the various clauses of a single-sentence Amendment.

The Kansas Supreme Court majority did not consider any of the paradigm-shifting developments

in Sixth Amendment interpretation since *Harvey* was decided in 1990. One major theme to emerge from this Court's recent Sixth Amendment caselaw is the political significance of the jury's traditional autonomy. That recent emphasis is a corrective to the single most striking long-term trend in constitutional criminal procedure: the systematic diminution of the jury's autonomy, a process that has proceeded apace since *Sparf v. United States,* 156 U.S. 51 (1895). Judge Jack Weinstein is only one of several recent observers to suggest the pendulum is beginning to swing back from its apogee. *United States v. Polizzi,* 549 F.Supp.2d 308, 421-22 (E.D. N.Y. 2008) (citing *Crawford* for the proposition that "Justice Gray dissenting in *Sparf* seems to have hit both the modern and ancient marks exactly.").

Recent caselaw has recognized that the jury is an aspect of the Framers' political plan for divided government. *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) ("the right of jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."). In concrete terms, jury service is practical democracy, a way for ordinary citizens to participate in the functioning of their government. *Powers v. Ohio,* 499 U.S. 400, 406-07 (1991). *Accord Miller-El v. Dretke,* 545 U.S. 231, 272-73 (2005) (Breyer, J., concurring); John Paul Stevens, "Foreword, Symposium: The Jury at a Crossroad: The American Experience," 78 CHI.-KENT L. REV. 907, 907 (2003). The Kansas Supreme Court's majority opinion diminishes "the democratic element

of the law." *Powers,* 499 U.S. at 407. Allowing a defendant to testify under oath without fear of self-contradiction by his own prior volunteered remarks deprives the jury of information essential to the effective performance of its core credibility-determining function.

The interpretative approaches developed in this Court's recent decisions concerning other clauses of the Sixth Amendment should apply equally to the assistance of counsel clause. When so applied they reveal that the Kansas Supreme Court's majority opinion is far outside the mainstream currents of contemporary Sixth Amendment jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Kansas Supreme Court.

Respectfully submitted,

GARY K. KING
Attorney General of New Mexico

JOEL JACOBSEN
Counsel of Record
Assistant Attorney General

111 Lomas Blvd., NW, Suite 300
Albuquerque, NM 87102
(505) 222-9061

Counsel for Amici Curiae